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*Attorneys for Certain Victims
From the Camp Fire and
2017 North Bay Fires*

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

PG&E CORPORATION

-and-

**PACIFIC GAS AND ELECTRIC
COMPANY,**

Debtors

☐ Affects PG&E Corporation

☐ Affects Pacific Gas and Electric
Company

☒ Affects both Debtors

** All papers shall be filed in the Lead
Case, No. 19-3088 (DM)*

Bankruptcy Case
No.: 19-30088 (DM)

Chapter 11
(Lead Case) (Jointly Administered)

**MOTION TO EXPUNGE CLASS
PROOF OF CLAIM FILED BY GER
HOSPITALITY, LLC**

Hon. Dennis Montali

Date: April 29, 2020

Time: 10:00 a.m. (Pacific Time)

Place: United States Bankruptcy Court
Courtroom 17, 16th Floor
San Francisco, CA 94102

1 **TO THE HONORABLE DENNIS MONTALI, UNITED STATES**
2 **BANKRUPTCY JUDGE:**

3 Claimants represented by the undersigned are victims of the Atlas, Redwood,
4 and Camp Fires. These claimants respectfully represent:

5 **I. RELIEF REQUESTED**

6 Claimants represented by the undersigned file this Motion¹ pursuant to 11
7 U.S.C. § 502 and Federal Rule of Bankruptcy Procedure 9014(c), seeking entry of an
8 Order expunging the class proof of claim filed by GER Hospitality, LLC [Claim No.
9 4] from the record.

10 **II. JURISDICTION**

11 This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157
12 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

13 **III. PRELIMINARY STATEMENT**

14 Although a Bankruptcy Court has the discretion to allow class proofs of claims,
15 it generally refuses to do so where the putative class has not been certified pre-
16 petition, the putative class members have all received actual or constructive notice,
17 and where class claims would adversely impact the administration of the estate. These
18 are the circumstances surrounding GER Hospitality's class proof of claim and
19 therefore it should be expunged.

20 At no point after filing its complaint in state court did GER Hospitality move
21 for certification. And at no point after filing its class proof of claim did GER
22 Hospitality move this Court to permit class treatment of its claims. Indeed, GER
23

24
25 ¹ Claimants make this request in the form of a motion to expunge GER Hospitality's class proof of claim. *See*,
26 *e.g.*, *In re Sequoia Senior Solutions, Inc.*, 2017 WL 2533345, at *2 (Bkrcty.N.D.Cal., 2017) (debtor filed motion to
27 expunge in response to class proof of claim and before claimant moved for application of Rule 7023 of the
28 Federal Rules of Bankruptcy Procedure). Claimants have standing as general creditors to object to GER
Hospitality's class proof of claim. *See, e.g.*, *In re Charter Co.*, 68 B.R. 225, 228 (Bankr. M.D. Fla. Pa. 1995) ("Since
the law does not impose a duty on the debtor-in-possession to act in the best interest of all general creditors,
the Court will not disregard the plain language of § 502(a) and limit the right of general creditors to object to
the allowance of a proof of claim in a chapter 11 proceeding.")

1 Hospitality has taken no action at all to certify its putative class in any forum since
2 commencing litigation on December 22, 2017.

3 While class treatment may be appropriate in bankruptcy proceedings, that is not
4 the case where the putative class members have received notice of the bankruptcy case
5 and the bar date. *See In re Sacred Heart Hosp. of Norristown*, at 22 (“[I]f the putative
6 unnamed class members have clearly received actual or constructive notice of the
7 bankruptcy case and the bar date, denial of the implementation of the class proof of
8 claim device appears advisable.”) Exhaustive notice procedures, an extension of the
9 original bar date, and appointment of a Special Claims Representative has
10 accomplished a high percentage of claims filed. Indeed, this Court previously cited the
11 “robust” notice procedures that were “carefully calculated to reach all potential
12 claimants,” as a reason to deny a motion for class certification. *See Order Denying*
13 *Class Representative’s Motion to Extend Application of FRCP 23 to Class Proofs of*
14 *Claim*. [Docket No. 4925.]

15 Most importantly, this Court should refuse to allow GER Hospitality’s class
16 claims because of the adverse impact it would have on the administration of the estate.
17 Its class claim would create new procedural hurdles absent in normal bankruptcy
18 proceedings, require a new round of notices and opportunities to opt out under Rule
19 23, and create the need for pre-certification discovery. Claimants who have already
20 filed their claims timely may be subject to delay and a diminished fund for
21 compensation of their injuries. In short, there is much to lose and little to gain.

22 Although the foregoing reasons are enough to justify expunging GER
23 Hospitality’s class proof of claims, there is yet another reason: It cannot, as it must,
24 satisfy Civil Rule 23. As discussed further below, there is no risk of inconsistent
25 decisions warranting certification under Civil Rule 23(b)(1), nor is there any
26 “superiority” of class proceedings that would warrant certification under Civil Rule
27 23(b)(3).

28 For all these reasons and those set forth below, this Court should expunge GER

1 Hospitality's class proof of claim.

2 **IV. BACKGROUND**

3 *a. The Chapter 11 Cases*

4 On January 29, 2019 PG&E Corporation and Pacific Gas and Electric Company
5 (collectively, "PG&E") commenced with this Court voluntary cases under Chapter 11
6 of Title 11 of the United States Code (the "Bankruptcy Code"). PG&E continues to
7 operate their business and manage their properties as debtors in possession pursuant to
8 sections 1107(a) and 1108 of the Bankruptcy Code. The Court recently appointed the
9 Honorable John K. Trotter as trustee of the claims resolution trust and Cathy Yanni as
10 the claims administrator. PG&E's Chapter 11 cases are being jointly administered for
11 procedural purposes only pursuant to Rule 1015(b) of the Federal Rules of
12 Bankruptcy Procedure.

13 *b. The Bar Date Orders*

14 On May 1, 2019, PG&E filed a motion [Docket No. 1784] requesting entry of
15 an order (i) establishing October 21, 2019 as the last date to file proofs of claim in the
16 Chapter 11 cases (the "Original Bar Date"), (ii) establishing the form and manner
17 thereof, and (iii) approving PG&E's plan for providing notice of the Original Bar Date
18 and other important deadlines and information to all creditors and potential creditors,
19 including publication and other supplemental noticing procedures.

20 By order dated July 1, 2019, the Court granted PG&E's motion, which
21 approved the Original Bar Date and PG&E's notice procedures, as modified prior to
22 and at the hearing. [Docket No. 2806] The Court subsequently considered a
23 stipulation between the Debtors and the Official Committee of Tort Claimants and
24 entered an order [Docket No. 4672] which extended the Original Bar Date to
25 December 31, 2019 (the "Extended Bar Date").

26 *c. The Notice Procedures*

27 Consistent with the Court's July 1, 2019 order, over 6.5 million Bar Date
28 notices were directly mailed to potential claimants, which included notice of the

1 deadline for filing claims and related procedures as well as an applicable proof of
2 claim form.

3 In addition to providing actual notice, PG&E implemented a Supplemental
4 Notice Plan to provide extensive constructive notice to known and unknown claimants
5 using traditional and non-traditional means. The Supplemental Notice Plan included
6 publication in print, online, social, radio, and television media outlets. That Plan
7 generated over 730,000,000 opportunities to see the Bar Date notice.

8 In the order extending the Original Bar Date, the Court appointed Michael G.
9 Kasolas to serve as a Special Claims Representative for the benefit of Unfiled Fire
10 Claimants and was given “broad discretion” to identify and locate unfiled fire
11 claimants and implement procedures to provide notice of the Extended Bar Date
12 thereto, among other tasks.

13 The Claims Representative’s outreach effort to identify, locate and assist fire
14 victims who were eligible to file claims but failed to do so by the original bar date was
15 largely successful. In the Second and Final Report of the Court Appointed Claims
16 Representative [ECF No. 5432], the Claims Representative reported that the
17 “expansive outreach effort” resulted in an additional 9,265 unique individuals or
18 entities filing wildfire proofs of claim.

19 ***d. The Putative Class Action and Class Proof of Claim***

20 On December 22, 2017, GER Hospitality filed a putative class action complaint
21 in the Superior Court of the State of California for the County of Sonoma, case no.
22 SCV261723. On February 5, 2019, PG&E sent a Notice of Bankruptcy Filing and
23 Imposition of Automatic Stay, notifying GER Hospitality that the proceeding was
24 stayed pursuant to section 362(a) of the Bankruptcy Code. GER Hospitality’s putative
25 class was not certified before the January 29, 2019 petition date, nor did it ever move
26 for certification. No activity has taken place since the Notice of Bankruptcy.

27 In the complaint, GER Hospitality seeks, on behalf of itself and the putative
28 class, damages to property, loss of business profits, and repair, depreciation, and/or

1 replacement of damaged property, among other things. GER Hospitality defines the
2 putative class as: “All business entities located in Sonoma, Napa, Mendocino, Lake,
3 and Solano Counties who suffered economic losses due to the wildfires that started on
4 or shortly after October 8, 2017...”

5 On January 29, 2019, GER Hospitality filed its class proof of claim, and on the
6 following day it filed an amended class proof of claim.

7 V. ARGUMENT

8 Although the Ninth Circuit has held that Civil Rule 23 is available to
9 bankruptcy claims, it is not applied often. *See Mortland v. Aughney*, No. C 11-00743
10 WHA, 2011 WL 2653515, at *2 (N.D. Cal. July 6, 2011); *see also In re Sacred Heart*
11 *Hosp. of Norristown*, 177 B.R. 16, 22 (Bankr. E.D. Pa. 1995) (“[W]e believe that the
12 class proof of claim device may be utilized in appropriate contexts, **but that such**
13 **contexts should be chosen most sparingly.**”) (Emphasis added). This is because the
14 benefits of class litigation diminish when bankruptcy proceedings are pending. As the
15 *Mortland* court explained: “many of the policy factors supporting class actions are
16 absent in bankruptcy proceedings. Proof-of-claim forms are free, accessible, and easy
17 to fill out, the costly barriers to litigation—which deter many small claims—are
18 reduced. Furthermore, the bankruptcy process is already efficient; it consolidates
19 claims just as a class action does.” *Mortland*, 2011 WL 2653515, at *2.

20 Application of Civil Rule 23 is extended to contested matters by Federal Rule
21 of Bankruptcy Procedure 9014, which grants the court discretion to apply Civil Rule
22 23 to contested matters, including claims objections. *See id.* That discretion is guided
23 by a three-factor framework adopted from *In re Musicland Holding Corp.*, 362 B.R.
24 644, 654 (Bankr. S.D.N.Y. 2007). The court’s inquiry ends if the *Musicland* test
25 counsels against permitting a class proof of claim. *See In re Verity Health Sys. of*
26 *California, Inc.*, No. 2:18-BK-20151-ER, 2019 WL 2461688, at *7 (Bankr. C.D. Cal.
27 June 11, 2019) (“Only if the Court determines that it is appropriate to apply
28 Bankruptcy Rule 7023 to the claims administration process does the Court proceed to

determine whether the requirements of Civil Rule 23 have been satisfied.”); *In re Craft*, 321 B.R. 189, 198–99 (Bankr. N.D. Tex. 2005) (“[T]he court need not reach the second issue” after declining to invoke Bankruptcy Rule 7023).

Here, each of the *Musicland* factors counsels against allowing class claims in bankruptcy. For that reason alone, the court should expunge GER Hospitality’s class proof of claim. However, as discussed below, expungement is also warranted because GER Hospitality cannot – as it must – satisfy the requirements of Civil Rule 23.

a. The Court Should Not Use Its Discretion to Allow Class Proof of Claims

Bankruptcy courts have used the three *Musicland* factors to guide their discretion on whether to allow class claims. *See Verity Health Sys.*, 2019 WL 2461688, at *7; *In re Musicland Holding Corp.*, 362 B.R. at 654. No factor is dispositive, and one factor may take on greater or less importance in any given case. *Verity Health Sys.*, 2019 WL 2461688, at *7. The three *Musicland* factors ask (i) whether the class was certified pre-petition; (ii) whether the members of the putative class received notice of the bar date; and (iii) whether class certification will adversely affect the administration of the estate. *Id.* at *6. In this case, each *Musicland* factor weighs against allowing GER Hospitality’s class claims.

i. GER Hospitality’s Putative Class Was Never Certified

The first *Musicland* factor weighs against allowing class claims because GER Hospitality’s putative class was not certified before the January 29, 2019 petition, nor was it ever certified. *See Verity Health Sys.*, 2019 WL 2461688, at *8 (“The putative class was not certified prepetition, so the first *Musicland* factors weighs against applying Civil Rule 23 to the claims administration process.”). Even certification pre-petition does not ensure class treatment in bankruptcy. *See In re Tarragon Corp.*, No. 09-10555 DHS, 2010 WL 3842409, at *3 (Bankr. D.N.J. Sept. 24, 2010) (“In fact, a class action may be certified in a non-bankruptcy court and yet be subsequently disallowed to proceed in class form in the bankruptcy setting.”)

Where there has been no pre-petition certified class, Bankruptcy courts are

1 reluctant to extend Bankruptcy Rule 7023 to allow the filing of class proofs of claim.
2 *See In re Sacred Heart Hosp. of Norristown*, 177 B.R. 16, 22-24 (Bankr. E.D. Pa.
3 1995) (Bankruptcy court denied class claims because the state class action case had
4 not been previously certified as class); *In re Craft*, 321 B.R. at 189 (declining to apply
5 Bankruptcy Rule 7023 for a proposed class that was “not yet certified”).

6 GER Hospitality’s delay in moving for class certification further warrants
7 expungement of its class proof of claim. *Id.* at *5 (“Though a class proof of claim
8 may be filed in a bankruptcy court, *a claimant must move for class certification*
9 *without undue delay.*”) (Emphasis added.); *In re Blockbuster Inc.*, 441 B.R. 239, 241
10 (Bank. S.D.N.Y. 2011) (noting whether class claimant has moved for certification as a
11 factor guiding the court’s decision whether to allow class proof of claim). There is an
12 especially strong case for expunging GER Hospitality’s class proof of claim, as over a
13 year has passed since the class proof of claim was filed, and it has yet to move for
14 certification. *See Tarragon Corp.*, 2010 WL 3842409, at *5 (“Here, more than a year
15 after the class proof of claim was filed, the Claimant has yet to move for the
16 application of Federal Rule of Civil Procedure 23 pursuant to Bankruptcy Rule 7023.
17 **A class action under these facts works in opposition to the goals of bankruptcy.**”)
18 (Emphasis added).

19 **ii. Class Claimants Have Received Notice of Multiple Bar Dates**

20 The second *Musicland* factor also weighs against allowing class claims because
21 the class claimants have received actual or constructive notice of the multiple Bar
22 Dates. *See In re Sacred Heart Hosp. of Norristown*, 177 B.R. at 22 (“[I]f the putative
23 unnamed class members have clearly received actual or constructive notice of the
24 bankruptcy case and the bar date, denial of the implementation of the class proof of
25 claim device appears advisable.”) In addition to the actual notice provided to the
26 majority of the potential class members, PG&E implemented an exhaustive noticing
27 campaign that included published notice of the Original Bar Date in *People*, *Sports*
28 *Illustrated*, *Sunset Magazine*, *The Wall Street Journal*, *USA Today*, and in twenty-

1 seven local newspapers distributed throughout Northern California. PG&E also
2 advertised across 4,000 different websites and social media, engaged social
3 influencers to share information about the Original Bar Date on social media,
4 sponsored Google advertisements, and purchased billboards, streaming video rights,
5 and airtime on television and radio.

6 To further provide notice and increase the number of claims filed, the Court
7 extended the Original Bar Date and appointed a special claims representative for the
8 benefit of unfiled fire claimants. That special claims representative, Michael G.
9 Kasolas, was given “broad discretion” to identify and locate unfiled fire claimants and
10 implement procedures to provide notice of the Extended Bar Date. Those efforts were
11 largely successful and helped an additional 9,265 unique individuals or entities file
12 wildfire proofs of claim.

13 In light of the exhaustive noticing campaigns, sophisticated business such as
14 GER Hospitality, as well as the class members it purports to represent, would have
15 received notice of the multiple bar dates.

16 **iii. Class Claims Would Adversely Affect the Administration of**
17 **the Estate**

18 The third *Musicland* factor also counsels against allowing class claims, as class
19 proceedings would adversely affect the administration of the estate in time and cost.
20 Class proceedings would assuredly cause undue delay: Class claims would create
21 numerous procedural hurdles absent in normal bankruptcy proceedings; create the
22 need for pre-certification discovery; and necessitate new notices and opportunities to
23 opt out under Civil Rule 23. *See In re Ephedra*, 329 B.R. at 5 (“Applying Rule 23 to
24 the class claims now would initiate protracted litigation that might delay distribution
25 of the estate for years. Pre-certification discovery would be needed for three putative
26 class claims with three putative class attorneys. . . If the classes were then certified,
27 notice to class members followed by discovery on the merits and the bankruptcy
28 equivalent of a trial would further delay distribution.”).

To borrow the words of S.D.N.Y. Bankruptcy Judge Stuart Bernstein, allowing

GER Hospitality's class claim would "gum up the works" of distributing the estate. *See In re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 376 (Bankr. S.D.N.Y. 1997) ("[A] bankruptcy case can proceed no faster than its slowest matter [] and a class action may 'gum up the works' because until complete, the bankruptcy court cannot determine the entitlement of the other creditors.")

And yet another reason counsels against allowing class claims: Applying Civil Rule 23 after expiration of the Extended Bar Date would violate the due process rights of those who filed timely claims by giving claimants who failed to do so a "second bite at the apple." *See Sacred Heart Hosp.*, 177 B.R. at 23 ("Tinkering with an established bar date may raise due process claims of parties who have timely filed claims by originally-established bar dates, since it gives late filers a second bite at an apple which is likely to be less than fully satisfying, and thus effect unfair diminution of the timely filer's share of a distribution").

Accordingly, the Court should expunge GER Hospitality's class proof of claim because each *Musicland* factor and other important non-*Musicland* factors all strongly counsel against allowing class claims.

b. GER Hospitality Does Not Satisfy the Basic Requirements of Civil Rule 23

Although the inquiry should end after deciding that the *Musicland* test strongly weighs against allowing class claims, the Court should also expunge GER Hospitality's class proof of claim because it does not meet the requirement of Civil Rule 23. Other than attaching its state complaint to the class proof of claim, GER Hospitality has done nothing to demonstrate that it has met the requirements for class certification.

In order to satisfy Civil Rule 23, GER Hospitality must demonstrate that it can be certified as a Rule 23(b)(1) or Rule 23(b)(3) class.² GER Hospitality's putative

² There is a third Rule 23 class action, Rule 23(b)(2), but this would not be appropriate for GER

1 class cannot be certified as either.

2 Under Rule 23(b)(1), a class may be maintained if “prosecuting separate actions
3 by or against individual class members would create a risk of ... adjudications with
4 respect to individual class members that, as a practical matter, would be dispositive of
5 the interests of the other members not parties to the individual adjudications or would
6 substantially impair or impede their ability to protect their interests.” Here, filing
7 individual proofs of claims, as opposed to a class proof of claim, creates no risk of
8 inconsistent decisions that would impair the ability of fire victims to protect their
9 interests. This Court will adjudicate all proofs of claim and therefore there is no risk of
10 other courts issuing inconsistent decisions. *See In re Verity*, 2019 WL 2461688, at
11 *15.

12 GER Hospitality fares no better under a Civil Rule 23(b)(3) analysis. Under
13 Civil Rule 23(b)(3), a class may be maintained if the court finds that the questions of
14 law or fact common to class members predominate over any questions affecting only
15 individual members, and that a class action is superior to other available methods for
16 fairly and efficiently adjudicating the controversy. Superiority tests whether “class
17 litigation of common issues will reduce litigation costs and promote greater
18 efficiency.” *In re Ferrero Litigation*, 278 F.R.D. 552, 561 (S.D. Cal. 2011) (*quoting*
19 *Valentino v. Carter–Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Considering
20 the additional procedural hurdles created by class claims, increased discovery costs
21 and attorneys’ fees, and undue delay, GER Hospitality cannot demonstrate that class
22 litigation would be superior to normal bankruptcy processes.

23 Indeed, any superiority of class action “vanishes” when there are pending
24 bankruptcy proceedings. *See In re Ephedra*, 329 B.R. at 9 (“This superiority of the
25 class action vanishes when the ‘other available method’ is bankruptcy, which
26

27 _____
28 Hospitality’s class claims as “the relief sought in the complaint is primarily monetary in nature.”
See In re Kibler, No. 00-2604, 2001 WL 388764, at *6 (Bankr. E.D. Cal. Mar. 19, 2001).

1 consolidates all claims in one forum and allows claimants to file proofs of claim
2 without counsel and at virtually no cost.”); *In re Motors Liquidation Co.*, 447 B.R.
3 150, 163 (Bankr. S.D.N.Y. 2011) (“[T]he inherent simplicity of the bankruptcy
4 process tends to make class action treatment not superior, as a general matter and in
5 this case, because an individual claimant would need only to fill out and return a proof
6 of claim form.”)

7 Accordingly, GER Hospitality cannot demonstrate that it satisfies the
8 requirements of Civil Rule 23. For this additional reason, the Court should expunge its
9 class proof of claim.

10 VI. CONCLUSION

11 For the foregoing reasons, claimants represented by the undersigned
12 respectfully request that this Court enter an order expunging from the record the Class
13 Proof of Claim filed by GER Hospitality in its entirety.

14
15
16 Dated: March 23, 2020

Respectfully submitted,

17
18 **CASEY GERRY SCHENK**
FRANCAVILLA BLATT
& PENFIELD, LLP

19 By: /s/ James M. Davis

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24 From the Camp Fire and
25 2017 North Bay Fires
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